

LAW CURRENTS An informational newsletter from Richard A. Klass, Esq.

To Be (Settled), or Not to Be (Settled), That's the Question

The personal injury action was commenced in 2020. The defendant filed its answer to the complaint and discovery proceedings took place. The plaintiff provided his bill of particulars describing all of his injuries and the manner in which the defendant was negligent. Depositions of the parties took place.

Note of Issue Is Filed

Once the parties exchanged their discovery, the plaintiff's attorney filed the Note of Issue with the Certificate of Readiness (the document that places a case onto the trial calendar). The case was conferenced in the Jury Coordinating Part by the judge on several occasions until, finally, the last date in 2024.¹ Apparently, at that



¹ Once a lawsuit is filed, the court system sends the case to different courtrooms (referred to as "calendars") at certain stages of the litigation until eventually the case is either tried to its conclusion or disposed of. At almost every stage of litigation, the court system will help the litigants if they wish to settle their dispute. Prior to trial, the litigants and/or their counsel will typically attend a settlement conference before a judge. If the case cannot be settled at this juncture, it will be sent to the jury clerk for jury selection and assignment to another judge for trial.

Section 202.22 Calendars.

(a) A judge to whom cases are assigned under the individual assignment system may establish such calendars of cases as the judge shall deem necessary or desirable for proper case management. These calendars may include:

(1) Preliminary Conference Calendar. A preliminary conference calendar is for the calendaring for conference of cases in which a note of issue and certificate of readiness have not yet been filed.

(2) Motion Calendar. A motion calendar is for the hearing of motions.

(3) General Calendar. A general calendar is for actions in which a note of issue and a certificate of readiness have been filed but which have not as yet been transferred to a pretrial conference calendar or a calendar containing cases that are ready for trial.

(4) Pretrial Conference Calendar. A pretrial conference calendar is for actions awaiting conference after the note of issue and certificate of readiness have been filed.

(5) Reserve Calendar. A reserve calendar is for actions that have had a pretrial conference or where such conference was dispensed with by the court, but where the actions have not yet been transferred to a ready calendar.

(6) Ready Calendar. A ready calendar is for actions in which a trial is imminent.

(7) Military Calendar. A military calendar is for cases where a party to an action or a witness necessary upon the trial is in military service, and is not presently available for trial, and a deposition cannot be taken, or, if taken, would not provide adequate evidence.

last conference date, it was indicated that the case was marked “settled before jury selection commenced.”

Action Not Settled

Despite the marking on the court’s calendar, this was not a true marking of the calendar.² The plaintiff learned from his then-attorney that his attorney agreed with the defendant’s attorney to mark the case off the calendar with the intention of proceeding with private arbitration without the client’s prior knowledge or consent. At that point, the client lost complete faith in his attorney based on this lack of communication.

Substitution of Counsel

The plaintiff decided to substitute attorneys since his attorney made such an important strategic decision concerning his legal matter without discussing it with him first. Upon contacting prior counsel, it was discovered that the attorney contacted a private

arbitration company regarding the arbitration of the personal injury claim instead of proceeding to a jury trial without discussing the matter with his client. However, the actual arbitration agreement had not been formally entered into by the parties.

Restoration of Case Marked “Settled”

The plaintiff had **Richard A. Klass, Esq.**, *Your Court Street Lawyer*, make a motion to restore the action for a jury trial instead of an arbitration proceeding that the plaintiff had not agreed to.³

The defendant argued that, since the settlement of the case was made in “open court” and the attorney had authority to act on his client’s behalf, it was binding on the plaintiff, relying on two cases (*Deal v. Meenan Oil Co.*, 544 NYS2d 672 [2d Dept. 1989] and *Bauer v. Lygren*, 493 NYS2d 815 [2d Dept. 1985]).⁴

(8) Continuous Calendars. In any court not continuously in session, the calendars at the close of one term shall be used to open the following term and actions on the calendars shall retain their positions.

(b) Calendar Progression. With due regard to the requirements of statutory preferences and of section 202.24 of this Part, when actions are advanced from one calendar to another they shall progress from the head of one calendar to the foot of the next calendar and otherwise progress in order insofar as practicable unless otherwise determined by the court.

(c) Call of Calendars. Judges to whom actions and proceedings are assigned pursuant to the individual assignment system may schedule calls of any calendars they have established at such times as they deem appropriate.

(d) Readiness for Trial. When an action has been announced "ready" but a trial is not immediately available, counsel may arrange with the judge to be summoned by telephone, provided they agree to hold themselves available and to appear on one hour's notice, or at such other time as the court may order, at the time assigned for trial.

Section 202.26 Settlement and Pretrial Conferences.

(a) Settlement Conference. At the time of certification of the matter as ready for trial or at any time after the discovery cut-off date, the court may schedule a settlement conference which shall be attended by counsel and the parties, who are expected to be fully prepared to discuss the settlement of the matter.

² The term “marking” refers to the notes the judges make about the case, especially when a case is settled.

³ In every case, there may be strategic reasons to opt for arbitration, bench trial or jury trial. The decision should be made after informed considerations between a client and his attorney.

⁴ An oral agreement made between litigants or their attorneys before a judge in “open court” is considered binding on them in the same manner as if made in writing.



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In this case, there was no definiteness to the terms of the settlement and the motion to restore was made within one year of the action being marked settled. Case law holds that an action may be restored to the trial calendar without having to show any excuse or merit. See, *Long-Waithe v Kings Apparel Inc.*, 10 AD3d 413, 414 [2d Dept 2004] (“Since the case was marked “settled” and not marked off the calendar pursuant to CPLR 3404 (*see Baez v. Kayantas*, 298 A.D.2d 416, 748 N.Y.S.2d 389), the plaintiff was not obligated to demonstrate a reasonable excuse, meritorious action, lack of intent to abandon, and lack of prejudice in order to have the matter restored to the calendar (*cf. Basetti v. Nour*, 287 A.D.2d 126, 731 N.Y.S.2d 35).”). The judge granted the motion to restore and the case proceeded in court to settlement before the trial judge.

— *Richard A. Klass, Esq.*

Richard A. Klass, Esq., maintains a law firm engaged in civil litigation at 16 Court St., 28th Fl., Brooklyn, NY. He may be reached at (718)COURT•ST or RichKlass@courtstreetlaw.com with questions. Prior results do not guarantee a similar outcome.

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***Eleven Years in a Row:
Richard A. Klass selected
for New York Metro
Super Lawyers List***



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